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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. QUOCHUY TRAN, Defendant and Appellant.	A129489 (Alameda County Super. Ct. No. C159600)

Quochuy Tran (appellant) appeals from a judgment entered after a jury convicted him of murder and found he personally and intentionally discharged a firearm, causing death. He contends: (1) the trial court erred in refusing to instruct the jury with CALCRIM No. 570, heat of passion; and (2) a sentence of 50 years to life in prison "imposed upon a youth who was sixteen years of age at the time of his commission of the crime violates the cruel and/or unusual punishment clauses of the United States and California Constitutions." We reject the contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 17, 2008, an information was filed charging appellant with murder (Pen. Code, § 187). The information also alleged appellant personally and intentionally discharged a firearm, causing death (Pen. Code, §§ 12022.7, subd. (a), 12022.53, subd. (d)). At a jury trial, over three dozen witnesses testified regarding an incident that led to the victim's death on October 31, 2007. That evening, the victim, 15-year-old Ichinkhorloo "Iko" Bayarsaikhan, went to dinner with her cousin and some friends, then

joined her brother and his friends at a park in Alameda to celebrate her brother's seventeenth birthday.

Earlier that evening, appellant's group of friends, which consisted of six males including appellant and two females, gathered at a recreation center in Oakland. Appellant was 16 years old at the time. Among the five other males—all of whom were juveniles—was 16-year-old George, who brought a sawed-off, loaded semiautomatic rifle with him, and appellant's friend Kevin, who was 15 years old.[1] The two girls in the group were appellant's 15-year-old girlfriend and Kevin's 14-year-old girlfriend, who was also George's sister. George concealed his rifle inside a hole he had cut on the inside of a black puffy jacket.

Appellant's group took the bus to Alameda. They were trick or treating, and at some point, George got into a confrontation with some girls, took his rifle out of his jacket and frightened the girls off. Because George was on probation and not permitted to have a firearm, Kevin took the rifle and jacket from him. After George displayed his rifle, appellant's girlfriend said she wanted to go home, but appellant told her "no."

Later, as appellant and his group walked down the street, someone in a van threw eggs at them, and George ran after the van but was unable to catch up with it. Everyone was upset, and according to one of the boys, appellant "said he was really mad and wanted to rob somebody." Appellant or Kevin suggested robbing two girls and a boy they encountered on the sidewalk, and approached the trio. The robbery was cut short when one of the girls recognized Kevin and complained, "oh, Kevin, you gonna do me like that?" Appellant's group then decided to go back to Oakland and tried to catch a bus but it passed them by. This also angered appellant, who suggested robbing Iko and her friends, stating, "Let's go and rob the people in the park. Are you down with that shit?" or "let's go rob them."

The six boys in appellant's group entered the park, and the two girls stayed behind. Appellant, Kevin, and a third boy, Alex, concealed their faces with the hoods of their

[1] The accomplices were referred to by their first names throughout the trial. We will do the same.

sweatshirts and approached Iko and her friends, who were hanging out by the swings and benches in the playground. Alex asked, "What are you looking at?" or "What the fuck you looking at?" to which someone in Iko's group responded, "Nothing." Appellant or Kevin ordered Iko's group to give him their money, and Kevin fired several shots in the air. Iko and her friends scattered and fled behind trees and a nearby bathroom structure.

Appellant, Kevin, and Alex turned away, and all six boys in their group started to leave the area. Iko's friends, who were unarmed but thought the rifle Kevin had fired was not a real gun, began walking towards appellant and his friends, intending to "beat them up." One of the boys in Iko's group said the weapon was a "cap gun." Before firing one shot into the crowd, appellant got the rifle from Kevin and said, "this ain't no cap gun. You think I'm playing?"[2] The bullet struck Iko in the back, puncturing her heart and a lung, and she screamed and fell to the ground. One of Iko's friends flagged down a police car and Iko was taken to the hospital, where she was pronounced dead later that night.

Appellant and his friends ran from the park and caught a bus back to Oakland. During the bus ride, appellant said, "where do you think I hit them [or her]?" and also said he thought he had "shot the girl in the leg." He also told his girlfriend that he had shot the girl. The following day, appellant told his ex-girlfriend, with whom he was still close friends, that he had shot someone. Several days later, appellant's group got together again and appellant threatened harm to Alex and his family if he told anyone about the shooting. Appellant and Kevin warned another accomplice, "don't tell, we know people who can hurt you."

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[2] During interviews with police and/or at trial, George was "a hundred percent positive" that appellant fired the shot that killed Iko. Alex saw appellant with the gun leveled toward Iko's group right before he heard the final shot. Kevin told police that appellant fired the shot that killed Iko. One of the other boys was "positive" appellant fired the shot that killed her. At trial, Kevin, who had referred to appellant as his "best friend," testified that he, not appellant, fired the last shot. Kevin said he initially blamed appellant because he was afraid of "[g]oing to jail for a long time."

The jury found appellant guilty as charged and the trial court sentenced him to a total of 50 years to life in state prison, which consisted of 25 years to life for murder and a consecutive 25 years to life for committing the murder with a firearm.

DISCUSSION

Jury Instruction

Appellant contends the trial court erred in refusing to instruct the jury with CALCRIM No. 570, heat of passion. We reject the contention.

CALCRIM No. 570 provides: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. . . . [¶] It is not enough that the defendant simply was provoked. . . . In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." Heat of passion manslaughter is a lesser included offense of murder and the trial court must instruct the jury with CALCRIM No. 570 when the evidence is "substantial enough to merit consideration" by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (*Ibid*.)

Here, the trial court declined to give the instruction, stating, "I don't believe there was evidence or substantial evidence or any evidence indicating that the defendant reasonably could have believed the immediate use of deadly force was necessary to defend against whatever danger he may have or, you may argue, that he viewed by these people approaching or walking toward him." We agree there was no substantial evidence to support the giving of the instruction. As Iko's friends approached appellant's group, appellant's group consisted of six males, one of whom was armed with a rifle. Although there were more people in Iko's group, and some of them wanted to "beat [appellant's group] up" after concluding (mistakenly) that the rifle was not real, the evidence showed Iko's group was unarmed, made no threatening gestures, and said nothing more aggressive than "Hey," as they first approached. Thus, there was no evidence Iko's group did anything that would have caused appellant to reasonably believe anything other than a fistfight might ensue. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 827 [simple assault does not support a heat of passion instruction].) Further, appellant and his friends were the ones who initiated the confrontation by approaching Iko's friends, insulting them, attempting to rob them, and frightening them with gunfire. A "person who provokes a fight [cannot] be heard to assert provocation by the victim, such that a reasonable person in his position would lose judgment and kill." (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312.) Appellant cannot successfully assert that Iko and her friends provoked him into killing Iko, when he and his friends were the ones who initiated the confrontation. Because there was no substantial evidence of provocation or an objectively reasonable fear of severe harm, appellant was not entitled to an instruction on heat of passion.

Appellant asserts the instruction should nevertheless have been given because even if there was insufficient evidence that an objectively reasonable person would have been " 'so disturbed or obscured by some passion,' " that "there was sufficient evidence from which a fully-instructed jury could have concluded that his heat of passion, albeit unreasonable, was such as to negate deliberation and premeditation so as to reduce the degree of murder to second degree." In addition to eliminating malice, heat of passion may also negate premeditation, such that first degree murder may be reduced to second

degree murder. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.) In contrast to the objective test for heat of passion voluntary manslaughter, heat of passion second degree murder requires substantial evidence that the defendant himself subjectively felt such passion that his reason was overridden. (*Id*. at p. 678.)

Here, there was no evidence of such passion. Although appellant was angry due to various events that occurred during the evening—e.g., eggs being thrown at his group, missing the bus back to Oakland—there was no evidence that he was so overcome with passion at the time he fired the shot that killed Iko that any premeditation would have been negated. Rather, his actions throughout the night were deliberate and intentional. Kevin testified that appellant was "looking for some trouble" at the beginning of the evening, before anything had occurred to incite him. When appellant became angry after passersby threw eggs at them, he said he wanted to rob somebody, and made his first robbery attempt with the three youths he and Kevin encountered on the street. After missing the bus, he suggested robbing Iko and her friends and went into the park with that intent. When someone in Iko's group said he thought the rifle was a cap gun, appellant bragged, "This ain't no cap gun. You think I'm playing?" This statement showed appellant was not acting out of any overriding passion that would negate any premeditation, but rather, that he was acting intentionally and deliberately when he aimed the gun at Iko and her friends and fired the shot that killed Iko. The trial court did not err in refusing to instruct the jury with CALCRIM No. 570.

Cruel and Unusual Punishment

The California Constitution, article I, section 17, prohibits the infliction of cruel or unusual punishment. In *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*), our Supreme Court held a punishment may violate the California Constitution "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." Under *Lynch*, there are three separate prongs of analysis: (1) the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society; (2) a comparison of the challenged penalty with punishments prescribed in the same jurisdiction

for different, more serious offenses; and (3) a comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions. (*Id.* at pp. 425-427.)

The federal standard is similar. The Eighth and Fourteenth Amendments to the United States Constitution also prohibit states from imposing cruel and unusual punishment on a criminal defendant. A criminal sentence is cruel and unusual if it is not proportional to the crime for which a defendant stands convicted. (*Solem v. Helm* (1983) 463 U.S. 277; *Harmelin v. Michigan (*1991) 501 U.S. 957.) To determine whether a sentence is disproportionate, courts are to evaluate certain identified objective criteria including the seriousness of the offense, the penalty imposed, the sentences imposed on others who have committed the same or similar offenses in the same jurisdiction, and the sentences imposed in other jurisdictions for the same or similar offenses. (*Solem v. Helm, supra,* 463 U.S. at p. 292.)

Appellant contends his sentence of 50 years to life in prison constitutes cruel and unusual punishment. The crux of his argument is that the sentence is unconstitutional because he was a juvenile at the time he committed the offense, and recent Supreme Court decisions have "emphasized the difference between juveniles and adults." He cites *Graham v. Florida* (2010) 560 U.S. ___ [130 S.Ct. 2011, 2021-2022], in which the United States Supreme Court recognized that punishments prohibited as unconstitutionally disproportionate to the offense generally fall into two classifications: Those that are categorically prohibited, and those that are prohibited based on the facts of a particular case. The *Graham* Court then held that *life sentences without the possibility of parole* (LWOP) for juvenile offenders who committed *nonhomicide offenses* fell into the first category and are categorically prohibited by the Eighth Amendment. (*Id*. at pp. 2022-2023.)

Appellant acknowledges he did not receive a LWOP sentence and that he was convicted of first degree murder, but argues that because he will be "in his mid to late 60's" if and when released from prison, and life expectancy within prisons is " 'considerably shortened,' " he will for practical purposes be imprisoned for the rest of his

life. He further argues that the fact that he committed murder should not, in and of itself, "preclude any consideration of relief, particularly under the circumstances of this case," in which he "foolishly shot a gun into a crowd"—"the type of act which a juvenile might commit," "not the carefully planned, sophisticated act of an adult criminal." Appellant is essentially urging this Court to extend *Graham*'s reasoning to find his sentence unconstitutional, which we decline to do. *Graham* expressly limited its categorical prohibition to LWOP sentences imposed on juveniles who commit nonhomicide offenses. (See *id*. at p. 2023 ["instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense"].) The case is inapplicable here because it is possible appellant will be released within his lifetime, and because he was convicted of first degree murder (see, e.g., *People v. Guinn* (1994) 28 Cal.App.4th 1130, 1147 [no prohibition on LWOP sentences for juvenile offenders convicted of murder; LWOP sentence for 17-year-old for felony murder was not "cruel and unusual" punishment even though the defendant was not the killer].)

Appellant analogizes his case to *People v. Dillon* (1983) 34 Cal.3d 441, but the case is inapposite. There, the defendant was a 17-year-old student who was immature and functioned and acted "like a much younger child." (*Id.* at p. 483.) The testimony established that at the time the defendant shot in the victim's direction, he had heard at least two shotgun blasts, believed his friends had been shot by individuals he had seen carrying guns, heard a man coming up behind him, and believed the victim was pointing at him. (*Ibid.*) The defendant's state of mind on the night of the killing went "from youthful bravado, to uneasiness, to fear for his life, to panic." (*Id.* at p. 482.) The punishment of life imprisonment in that case "turned out to be far more severe than all parties expected" because, although the trial court attempted to commit the defendant to the Youth Authority, a minor convicted of first degree murder was ineligible for such commitment at the time of his conviction. (*Id.* at p. 486.)

In contrast, here, appellant was young, but there was no evidence he was a "much younger child," emotionally, intellectually or socially. (*People v. Dillon, supra,* 34 Cal.3d at p. 483.) He was the instigator of both the attempted robbery and the killing, and the

evidence did not establish he was acting out of panic or fear when he aimed the gun at Iko and her friends and fired the shot that killed Iko. Iko was particularly vulnerable, as she was unarmed and had her back to appellant at the time he shot her. Appellant's sentence was proportional to his crime and does not violate constitutional prohibitions against cruel and/or unusual punishment.[3]

DISPOSITION

The judgment is affirmed.

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McGuiness, P. J.

I concur:

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Siggins, J.

[3] Appellant's case is more comparable to cases such as *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16-17, in which two groups of youths got into a fight with each other, with one of the aggressors shooting and killing an opponent. The Court of Appeal there concluded that a sentence of 50 years to life—composed, as here, of 25 years to life for murder and 25 years to life for committing the murder with a firearm—for a juvenile was not unconstitutional. (See also *People v. Em* (2009) 171 Cal.App.4th 964, 972-978 [50 years to life sentence imposed on a 15-year-old defendant constitutional]; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 12-13 [same].)

POLLAK, J., Concurring and Dissenting.

I agree with the majority that the trial court correctly refused to give the heat of passion instruction. I believe, however, that the 50-year-to-life sentence imposed upon defendant for the murder he committed when 16 years of age constitutes cruel and unusual punishment under the California Constitution. While the sentence in this case may not be the functional equivalent of life without the possibility of parole because defendant is likely to still be living when he becomes eligible for parole in his 60s, the 50-year sentence nonetheless denies him a "*meaningful* opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham v. Florida* (2010) 560 U.S.__, __ [130 S.Ct. 2011, 2030], italics added.) A sentence of that length, no less than a sentence of life without the possibility of parole, impermissibly prejudges that defendant will not be fit to reenter society at an age at which he will still be able to create a productive life for himself outside of prison walls. I share the views well expressed by Justice Moore, concurring and dissenting in *People v. Em* (2009) 171 Cal.App.4th 964, 978-981 ["A 50-year prison term should be reserved for our worst offenders," not "for an immature 15-year old with an underdeveloped sense of responsibility"].

The fact that defendant has been convicted of murder rather than a nonhomicide offense admittedly distinguishes this case from *Graham* and the protection of the Eighth Amendment as it has thus far been interpreted by the United States Supreme Court. The court currently has under consideration two cases questioning whether the reasoning of *Graham* extends to the imposition of life-without-parole sentences on young juveniles convicted of murder. (*Jackson v. Hobbs*, No. 10-9647, cert. granted Nov. 7, 2011; *Miller v. Alabama*, No. 10-9646, cert. granted Nov. 7, 2011.) However, the California Supreme Court has already determined that the protection afforded by article 1, section 17 of the California Constitution against the imposition of cruel and unusual punishment does extend to minors convicted of murder. (*People v. Dillon* (1983) 34 Cal.3d 441, 477-489.)

While the precise facts of this case and those in *Dillon* are of course different, there is no difference of sufficient significance to justify a different result. While defendant unquestionably was an instigator of the planned robbery, the killing here, as in *Dillon*, resulted from a single sudden and impulsive act. The murder unquestionably was a horrible and tragic crime for which defendant is justly severely punished, but the circumstances of the crime are markedly different from those in other cases in which life sentences or their equivalent have been held not to be so disproportionate as to constitute cruel and unusual punishment. (E.g., *People v. Murray* (2012) 203 Cal.App.4th 277, 285 ["Murray followed his victims into a secluded area where, backed by two armed accomplices, he gunned down his helpless victims"].) And, like the immature youth for whom a life sentence was held to be cruel and unusual punishment in *Dillon*, defendant demonstrated his immaturity at the time of the crime but has since demonstrated that he is not beyond rehabilitation. According to a counselor who worked with defendant after his incarceration, and who in 11 years had never written a supporting letter for a detainee:

> "[Defendant] is special. He has a supportive family, a positive world view, an incredible depth of emotional intelligence, a solid foundation of respect and discipline from his early childhood, as naïve as it may sound when I write this, a good heart.
>
> "It wasn't always easy to see. When he first arrived, 16, tough-talking, insecure, and extremely susceptible to peer influence, he was still trying to live up to the notorious reputation that his headline-making charges had afforded him. . . . [¶] . . . [¶] . . .
>
> "With all my heart, I wish [defendant] had been tried as a youth. Because when he came to the Hall, he was really a child. He was angry, impulsive, and dangerous to himself and others. By the time he left, he had matured into an admirable, independent-minded young man, someone who was an asset to his unit, and could be an asset to society in general, if allowed to continue on the path of self-improvement he had set on himself. He is that one in a million – the young person whose growth and depth inspire others to follow in his positive footsteps."

In my view, this is one of the relatively rare cases in which the claim that punishment is so excessive as to be cruel and unusual has merit.

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Pollak, J.